89-574

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
_____Term, 1989

GEORGE MILLER,
Petitioner,

against

CITY OF LOCK HAVEN, ET AL,
Respondents

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

George Miller
In Propria Persona
539 West Main Street
Lock Haven, PA 17745
(717) 748-2768

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Questions Presented

1. Do the doctrines of res judicata and collateral estoppel apply to the case before this court)?

2. Did the Appellant, in effect, attempt to appeal his state criminal conviction obtained in the district magisterial court directly to federal district court)?

3. Did the Appellant raise, or should he have have raised, before the Defendant District Justice the claims he made in this case pursuant to the First, Fourth, Fifth, and Eighth Amendments to the United States Constitution and the due process clause of the Fourteenth Amendment to the United States Constitution)?

4. Should the Appellant have appealed the guilty verdict or the fine and costs imposed by the Defendant, District Justice, though the Appellant was denied the right to an administrative hearing before the City's Zoning Hearing Board, before a City employee, acting as Zoning Officer (though she was not hired as said officer), filed a citation with the Defendant District Justice, against the Appellant, for a summary criminal offense)?

5. Did the Defendant District Justice have personal and subject matter jurisdiction in that case)?

6. Should the court below have granted the Appellant the right to amend his Complaint to add parties and pendente state claims for malicious prosecution, false arrest and false imprisonment, for exercising First Amendment rights)?

7. Did the lower District Court deny the Appellant "due process" of law under the Fifth Amendment to the United States Constitution, by refusing to grant the Appellant leave to amend his Complaint, and by dismissing the case, with prejudice?

8. Could, and should, the Appellant have relied upon the State courts, under federalism, for adequate relief (through the appeals process), rather than seeking relief in the Federal Courts?

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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
_____Term, 1989

George Miller,
In Pro Per,
Petitioner,

against

CITY OF LOCK HAVEN #1; DIANN H. STUEMPFLE, Individually and in her official capacity as Mayor #2; FRANK L. TAGGART, Individually and in his official capacity as City Manager #3; ROBIN A. YOST, Individually and in her official capacity as Zoning Officer #4; RICHARD SAXTON, ESQUIRE, Individually and in his official capacity as City Solicitor #5; JEROME E. DECKER, Individually and in his capacity as Councilman #6; GEORGE A. HENDRICKS, Individually and in his capacity as (former) Councilman #7; JUNE L. HOUSER, Individually and in her capacity as Councilman #8; GEORGE SHADE, Individually and in his capacity as Councilman #9; SCOTT A. SMITH, Individually and in his capacity as	D.C. Civil NO. 88-0347 3D Cir. Ct. NO. 88-6014

Councilman #10; JOHN B. FRAZIER, :
Individually and in his capacity as :
District Justice of Magisterial :
District No. 25-3-01, of Clinton :
County, Pa. #11; KEITH EICHENLAUB, :
Individually and in his capacity as :
Sheriff of Clinton County, Pa. #12, :
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

To The Honorable Chief Justice and the
Associate Justices of the Supreme Court:

George Miller petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

Opinions Below

The opinion of the Court of Appeals for the Third Circuit ("SUR PETITION FOR REHEARING"),

filed May 31, 1989 (App. A, infra, 1a) is not yet reported. The opinion of the said Court of Appeals ("JUDGMENT ORDER"), filed May 3, 1989 (App. B, infra, 2a) is not yet reported. The order of the United States District Court for the Middle District of Pennsylvania, filed December 23, 1988 (App. C, infra, 3a-6a), dismissing the case with prejudice, is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on May 3, 1989 (App. B, infra, 2a). Rehearing was denied on May 31, 1989 (App. A, infra, 1a). The jurisdiction of this Court is involved under 28 U.S.C. 1254(1). Act of March 3, 1891, 26 Stat. 826, 828, c. 517, Sec. 6.

Constitutional and Statutory Provisions Involved

This proceeding was brought pursuant to Title 28 USC Secs. 1331, 1332, 1343(3), 1343(4), 2201, and 2202; Title 42 USC Secs. 1981, 1983 (coterminous with the rights guaranteed by the Commonwealth of Pennsylvania as contained in the Pennsylvania Constitution) 1985, 1988; and the Constitution of the United States and more particularly the First, Fourth, Fifth, Eighth, Ninth, Tenth, and Fourteenth Amendments thereto. Jurisdiction was conferred on the District Court below by 28 U.S.C. Sec. 1331, Sec. 1343 and the amendments directly involved as set forth in the paragraph above. The lower court had pending jurisdiction over all state law claims. Plaintiff also brought the foregoing

action to secure equitable relief for the protection of his Civil Rights and liberties, for damages, compensatory and punitive, suffered by reason of the violation(s) of his Civil Rights and liberties as a result of action(s), caused, and undertaken under color of, and pretense of, State law. The amount in controversy exceeds the sum of $10,000.00 exclusive of interest and costs and (actual and/or potential) attorney's fees. This action also arises under the common law of the Commonwealth of Pennsylvania.

Statement

Appellant filed an individual complaint claiming violations of various federal rights by city, county and judicial officials based on a summary criminal proceeding for an alleged violation of a city ordinance.

This case arises out of the arrest, imprisonment, prosecution and conviction of the appellant for, allegedly, violating a sign zoning ordinance of the City of Lock Haven.

On October 15, 1987, a sign measuring 4' x 8,' which read: "YOU ARE NOW LEAVING 'LACK' HAVEN. TURN RIGHT AT THE SECOND LIGHT TO ENTER THE UNITED STATES," was attached to a vacant apartment building (added to four others) at 130-134 East Church Street, Lock Haven, PA.

On November 24, 1987, the City of Lock Haven sent a notice to "ANSPAR HOLDING COMPANY, LTD.," the owner of the building, claiming it was in violation of the City's sign zoning ordinance. The City required the filing of a permit application, the payment of a $75.00 fee, or that Anspar "remove the sign" on/or before December 3, 1987. (Exhibit 6 to the Plaintiff's Complaint).

On December 1, 1987, George Miller, President of Anspar, filed an appeal on behalf of Anspar, to the City's Zoning Hearing Board, requesting a hearing. Miller refused to pay the fee, however, claiming the City's Sign Zoning law didn't require the payment of a fee, by one charged with violating the City's sign zoning ordinance. The request for a hearing was denied.

On December 3, 1987, Miller removed an 8" x 12" FOR SALE sign from that building, leaving four signs affixed to the same. (Exhibit 6 to Plaintiff, George Miller's Complaint).

On December 9, 1987, the Defendant Yost, acting as zoning officer, filed a non-traffic citation directed to GEORGE MILLER, the Appellant describing the nature of the offense as violating the Defendant City of Lock

Haven's zoning ordinance by erecting a sign that read: "YOU ARE NOW LEAVING 'LACK' HAVEN. TURN RIGHT AT THE SECOND LIGHT TO ENTER THE UNITED STATES," with the Appellee District Justice Frazier. On December 10, 1987, the Appellee District Justice Frazier issued a summons directed to the Plaintiff. (Exhibits 10 and 11 to the Plaintiff's Complaint). The summons was served by United States first class mail on the Plaintiff (Plaintiff's Complaint at Paragraph 46). The Appellant did not respond to the summons within 10 days of receipt. On December 29, 1987, Appellee District Justice Frazier issued a second summons that was served by certified mail (Plaintiff's Complaint at Paragraph 49).

On January 2, 1988, the Appellant filed preliminary objections, by a petition to dismiss the citation or to transfer the case

to the civil side of Appellee District Justice's court, stating that Appellant Miller, as President of Anspar Holding Company, ltd., had filed an appeal with the City Zoning Board on December 1, 1987, aforesaid, requesting an administrative review of Appellee Yost's decision, as acting zoning officer, and that, therefore, the allegation by Appellee City that the Appellant had violated the city's sign zoning ordinance was a civil matter.

The Appellant claimed that the District Justice had no jurisdiction of the case because Appellant, though not notified of his right to appeal Yost's decision, he was entitled to an appeal, as of right, to the City's Zoning Hearing Board for an administrative hearing, before an action could be filed with the District Justice. Following

findings of fact rendered by the Board, if unfavorable to the Appellant, he, then, would have been entitled to appeal the Board's decision to the Clinton County Court of Common Pleas, in a civil proceeding. The Appellant also objected to Frazier conducting a hearing in the matter, as a criminal proceeding (summary case). He demanded that the District Justice dismiss the citation, or hold a hearing as in a civil suit. Frazier denied Appellant's objections, stating he was going to handle the matter as a criminal case.

Section one of the Civil Rights Act of 1871 (42 U.S.C. Sec. 1983) provides a private federal remedy for one deprived of federal rights under color of state law. Largely ignored for a long period of time after its enactment, this provision has been used increasingly in recent years to obtain redress

for the infringement of fourteenth amendment rights by state officials. However, important questions concerning its application have remained unsettled. For example, a frequent impediment to the prosecution of suits under the act has been the requirement that a plaintiff exhaust adequate state administrative remedies before proceeding in federal court. Prior to the 1967 term, the Supreme Court's treatment of the exhaustion requirement had been inconclusive. However, when the need for exhaustion was again urged upon the Court in Damico v. California, 389 U.S. 416 (1967), it was rejected summarily. The question was treated as one governed by settled law.

Damico was a suit by welfare claimants challenging a rule under the California Aid to Families with Dependent Children program which

required a three month waiting period after the father's desertion before benefits could be received. Plaintiffs, suing under the Civil Rights Act and proceeding before a three-judge district court, sought a declaratory judgment of unconstitutionality, injunctive relief, and damages. The court below dismissed the complaint on the ground that plaintiffs had failed to exhaust adequate state administrative remedies. The Supreme Court reversed in a one paragraph opinion:

> [To require exhaustion] was error. In McNeese v. Bd. of Educ. . . . noting that one of the purposes of the Civil Rights Act was to "provide a remedy in the federal courts supplementary to any remedy any state might have" . . . we held that "relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided [an administrative] remedy." . . . See Monroe v. Pape, 365 U.S. 167, 174 (1961).

And it's well settled in law, that an action brought against a defendant for violation of a municipal ordinance is a suit for the recovery of a penalty due the municipality and is a civil proceeding. Prosecution by citation, in the name of the Commonwealth of Pennsylvania, for a municipality, is a complete nullity. Com. v. Fantana, 23 Law.L.J. 227, 1968, In Re Investigating Grand Jury, infra. "It is clearly the law of Pennsylvania that the prosecution for violation of a municipal ordinance is procedurally a civil case." City of Philadelphia v. Joseph F. Kenny, Appellants Pa. Cmwlth, 369 A.2d 1343 (1977), citing "E.g. Waynesburg Borough v. Van Scyoc, 419 Pa. 104, 213 A.2d 216 (1965); Commonwealth v. Ashenfelder, 413 Pa. 517, 198 A.2d 514 (1964); Philadelphia v. Home Agency, Inc., 4 Pa. Cmwlth. 174, 285 A.2d (1971). , 23 law.l.J. 227, 1968)

In Re Investigating Grand Jury:

> "It has been consistently held by the appellate courts of this state that prosecutions under municipal ordinances are civil, not criminal actions." City of Philadelphia V. Home Agency, Inc., supra.
>
> "This Court has unanimously held that an action for violation of a municipal ordinance is 'civil in nature.' Waynesburg Borough v. Van Scyoc (supra), Accord, Commonwealth ex rel. Ransom Township v. Mascheska, 429 Pa. 168, 239 A.2d 386 (1968); Commonwealth v. Ashenfelder (supra). The City Solicitor, a locally appointed official, may not be permitted to infringe upon the District Attorney's powers or functions in the prosecution of the criminal law." In Re Investigating Grand Jury, supra and infra.

Pennsylvania Rule of Civil Procedure For Justices of the Peace No. 301 states:

"As used in this chapter, 'action' means an action of trespass or assumpsit brought before

a justice of the peace."

Comments to said Rule, in pertinent part, are as follows:

"Note: . . . A civil action for a municipal penalty, except when such an action is prohibited by statute (see, for example, Sec. 3301 of the Borough Code, Act of February 1, 1966, P.L. (1965) 1656, No. 581, Sec. 3301, as amended by Act of October 9, 1967, P.L. 399, No. 181, Sec. 3, 53 P.S. Sec. 48301), would be governed by these rules, for such an action is merely a form of action in assumpsit. See Act of April 15, 1835, P.L. 2291, Sec. 7, 42 P.S. Sec. 291 . . ."

"A distinction is to be drawn between summary convictions and those actions authorized for the recovery of penalties as debts are ordinarily recoverable. A summary

proceeding before a justice of the peace is in the nature of a criminal prosecution for a public crime or offense, and must be regulated by rules similar to those adopted by the common law in criminal prosecutions, the accused being acquitted or condemned by the decision of the person appointed by the statute for judge. It is predicated on an information, as are criminal prosecutions, and is followed by a warrant of arrest. They are such as are directed by statute for the conviction of offenders and the infliction of penalties.

"A proceeding to recover a fine for the violation of a borough or city ordinance is not a summary proceeding; it is of a civil nature, and is to be conducted according to the rules applicable to civil suits. Ordinances prescribing penalties generally

authorize their recovery before magistrates, as debts of a like amount or nature are recoverable; but whether designated as debts or not, suits for their recovery are civil and must be instituted as such. Where the entire penalty is for the benefit of the borough or city, the corporate name must be used as plaintiff. The suit cannot be in the name of the commonwealth." Act April 15, 1835, P.L. 291, Sec. 7; City of Duncan, 4 Phila. 145, 17 Phila. leg. Int. 373; St. Clair v. Carr, 2 Legal Record Rep. 87. Com. v. Davenger, 10 Phila. 478, 30 Phila. leg. Int. 321, 2 Luzerne leg. Reg. 177; Morgan v. Pittston, 5 Kulp, 186; Shamokin v. Flannigan, 156 Pa. 43, 26 Atl. 780.

The Appellant submits that: "All actions, prosecutions, complaints, and proceedings for the violation of the ordinances of the city,

and for fines, penalties, and forfeitures imposed thereby, shall be instituted in the corporate name of the city, and be conducted in the manner prescribed by law," are conclusory terms, intending said fines, penalties, and forfeitures to be recoverable in a civil proceeding, and thus, the rules of civil procedure would apply. (emphasis added). 53 P.S. Sec. 36017, as affected 1978, April 28, P.l. 202, No. 53, Sec. 2(a)[1127], effective June 27, 1978. , effective June 27, 1978]

On January 11, 1988, Justice Frazier issued a warrant of arrest for the Appellant; and the warrant was executed by the Appellee Clinton County Sheriff who took the Appellant into custody on that same date, and delivered the Appellant to the Appellee District Justice Frazier's court. (Plaintiff's Complaint at

Paragraphs 54-57, and Exhibit 13).

A public defender was provided for the Appellant, and the Appellant refused to plead either guilty or not guilty, but insisted on his right to have the matter heard as a civil case, rather than as a summary criminal offense. (Plaintiff's Complaint at Paragraph 58). The Appellant demanded an immediate trial, but Appellee City Solicitor Saxton was not available. Appellee District Justice entered a plea of "not guilty" for the Appellant, and informed the Appellant to deposit the fine and costs in the amount of $126 plus the Sheriff's costs as collateral for attendance at the hearing. The Appellant refused to post collateral. Frazier then informed the Appellant that he was going to incarcerate him in the Clinton County jail - not as "punishment" - but to ensure his

attendance at the hearing. Sheriff Eichenlaub and his deputy then delivered the Appellant to the jail, and the Appellant was incarcerated (Plaintiff's Complaint at Paragraph 59).

The Appellant was taken from the jail at 9:30 a.m., on January 13, 1988, by deputies of the Clinton County Sheriff's office, and taken to the court of the Defendant District Justice Frazier, and the summary offense trial took place, at 9:45 a.m., before Appellee District Justice Frazier. Though the Appellant was not provided the services of a public defender or advised that he had the right to be represented by legal counsel, Appellant objected to the proceedings on the grounds that alleged violations of municipal ordinances must be tried as civil cases, must be brought in the name of the municipality, and not in the name of the State, that the

action must be prosecuted by the county district attorney's office, if the District Justice Court insisted on handling the matter as a summary offense (quasi-criminal), or consent given by the district attorney to the city solicitor, to prosecute a summary case; that Appellee Saxton, as City Solicitor, had no permission from the District Attorney to prosecute that case; that the owner of the property was ANSPAR HOLDING COMPANY, LTD, that said corporation was, originally, cited (placed on notice) for the alleged sign zoning ordinance violation, by the city, that the City Zoning Hearing Board refused Anspar Holding Company, Ltd a hearing on its appeal; then Appellee Yost (who had not been hired by Appellee City as a Zoning Officer), acting as zoning officer, filed a citation for a summary criminal offense against GEORGE MILLER, Individually, the Appellant hereof, for the

alleged violation by Anspar Holding Company, Ltd. (Plaintiff's Complaint at Paragraphs 61-72).

The Appellant produced "the sign," (as was ordered by Yost) at the hearing, and argued that the sign was protected under the First Amendment to the United States Constitution (as a communicative sign), but was, nevertheless, convicted by Frazier. The Appellant was ordered to pay a fine of $100.00 and costs of $40.00, totaling $140.00 less $37.00 credit for jail time, or $103.00, without being given an indigency hearing following the trial, required by Pennsylvania Rule of Criminal Procedure No. 85(a)(b)(c)(d); and without being allowed 30 days to file an appeal to the Clinton County Court of Common Pleas, under threat of being recommitted to jail.

Miller didn't appeal Frazier's decision to the Clinton County Court of Common Pleas.

On March 4, 1988, Miller filed a suit in the U.S. District Court. This was an action for an injunction, declaratory judgment, damages, attorney's fees (if any), and other relief, that may be appropriate, under the First, Fourth, Fifth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitution, and pursuant to Congressional law.

Miller argued in briefs, that Yost was not hired by the City as the City's Zoning Officer; that she was only a City employee, usurping the authority of a Zoning Officer. Miller produced evidence, by way of the City's job description for City employees, which showed that David F. Romig, City Code Enforcement Officer was also the City Zoning

Officer; and that, therefore, Yost had no authority as a law enforcement officer, under Court rules, to charge anyone for a summary criminal offense, by citation, and had no authority to prosecute anyone charged with a violation of a municipal ordinance, by summary criminal procedure. Miller, further, argued that the sign for which he was cited, arrested, jailed and fined for, was a "communicative" (non commercial) sign, which was protected as free speech, under the First Amendment; and that there was no prohibition in the City's sign zoning ordinance prohibiting such a sign; that the City's sign zoning ordinance only regulated commercial signs; and that the City's sign zoning ordinance only required a permit application, and a fee, for a "commercial" sign.

On September 1, 1988, Federal Court Judge

Malcolm Muir dismissed all of Miller's claims with prejudice, with one exception. Muir ruled he would allow Miller to amend his Complaint within 20 days, to assert only the claim under the "equal protection" clause of the Fourteenth Amendment. The Court held that Miller should have argued his federal claims before the District Justice; and that Miller's suit was really an attempt to appeal the decision of a District Justice to the Federal Court, while Miller argued, in his briefs, and "Motions for Reconsideration" of Muir's orders, that: (1) he had argued his federal claims before that court, though a District Justice had no authority, under state law to consider federal questions; (2) that our State courts (District Justice Courts, Clinton County Court of Common Pleas, Superior Court and Supreme Court) have refused to honor established precedents of the State Supreme

Court, holding that violations of municipal ordinances must be conducted as civil proceedings, not summary offense or criminal proceedings. Miller contended in the federal court, by motions, and briefs, that the Clinton County Court of Common Pleas, in former cases, on appeal, by Miller, from decisions of the District Justice, in summary conviction proceedings, involving charges of City ordinance violations, denied appeals, when the appellant (Miller) filed "NOTICES OF APPEAL" to the CIVIL DIVISION of that Court. Miller explained that Judge Carson V. Brown would transfer the appeal, as policy, to the CRIMINAL DIVISION of his Court. Then he would order the appellant to refile his appeal to the criminal division. Refusal to comply with Brown's ORDER, would result in dismissal of appellant's appeal as of right, or a "trial de novo," (new trial) guaranteed under the

Constitution of the Commonwealth of Pennsylvania. Miller claimed that an appeal of a "summary conviction" to the criminal side of the Court, precluded "discovery," as of right, in an appeal to the civil side of that Court (as required by earlier State Supreme Court decisions, concerning municipal ordinance violations).

Miller argued, that given the foregoing, there was no adequate relief, in our State courts, by appealing to the County Court, then to the Superior Court (which held that the State Supreme Court can reverse its precedents without having to decide another case, on appeal, by simply legislating, by a rule of court, which is binding on the Superior Court), then to the State Supreme Court (which can refuse to hear an appeal), then to the United States Supreme Court (which has the

same option as the State Supreme Court).

In Lower Merion Township v. Chris Schenk, Pa. Super., 372 A.2d 934, in the appeal of Sister Christine Schenk, argued March 18, 1976 and decided April 19, 1977, having been found guilty of violating municipal ordinance imposing fine, and having appealed conviction to the Court of Common Pleas, Criminal Division of Montgomery County, October Term, 1974, the Township moved to strike the appeal on the ground that the action was civil in nature and that the appeal should therefore have been filed with the Prothonotary (Common Pleas Civil Division). The lower court granted the Township's Motion.

The Superior Court now held: that "the lower court was correct that under case law an appeal from a proceeding for a violation of a municipal ordinance must be brought in

conformance with the Rules of Civil Procedure. However, we find that the case has been overruled by Pa. R.Crim.P. 67, adopted September 18, 1973, effective January 1, 1974; we therefore hold that the lower court erred in striking appellant's appeal."

". . . if ever there was a case in which almost all of the actions taken by the prosecuting Township and by the District Justice implied ('screamed' would not be too strong) that the action was criminal, this is that case. The Township commenced the action by citation. Pa.R.Crim.P. 51(a)(2), 52, and 53(b). Citations are never used in civil proceedings. Pa. R.C.P.J.P. 103. Appellant was required to appear before the District Justice and plead 'guilty or not guilty.' She was also required to post 'security' in an amount equal to the fine and costs specified

on the citation. The citation warned appellant that 'failure to respond within the time specified above will result in the issuance of a warrant for her arrest.' Appellant was found 'guilty as charged' and 'fined.' The disposition of the case was recorded on a 'Summary Criminal Docket and Transcript.'"

The dissenting opinion in the Schenk case suggests that the Rules of Criminal Procedure govern only criminal procedures and that therefore they cannot change the status of proceedings for violations of ordinances, since under York v. Baynes, 188 Pa. Superior Ct. 581, 149 A. 2d 681 (1959), in which Judge Woodside, writing for the court stated at p. 585: "The question is a procedural one and involves no great principle of law, but it is important that it be settled. We shall,

therefore, . . . put the problem to rest," and because the court held in unequivocal terms that "an action brought against a defendant for the violation of a municipal ordinance is a suit for the recovery of a penalty due the municipality and is a civil proceeding," that such proceedings are civil in nature. But the majority held, in the Schenk case: "Inherent in this suggestion is the notion that the [Pa.] Supreme Court cannot overrule its own case law by means of its own Rules. However, no legal principle stands in the Supreme Court's way. 'The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts . . .' Pa.Const. art. 5, sec. 10(c)."

Thus, the Appellant would argue, that our State intermediate courts of appeal, and our State Supreme Court, not only interpret the law. They're SUPER and SUPREME legislatures.

And they're masters of obfuscation.

On December 23, 1988, Muir dismissed Miller's suit with prejudice and on the same date, Miller filed a "NOTICE OF APPEAl" to the UNITED STATES COURT OF APPEAlS For The Third Circuit, docketed to No. 88-6014.

On May 3, 1989, following the filing of briefs by Appellant Miller and the Appellees, the federal appellate court entered a JUDGMENT ORDER upholding the judgment of the U.S. District Court, and taxed the costs against the appellant, WITHOUT AN OPINION.

On May 16, 1989, Appellant Miller filed "Appellant's Petition For Rehearing In Banc" (by the full court).

On May 31, 1989, the appellate court denied Miller's petition, WITHOUT AN OPINION.

On June 30, 1989, Appellees filed a Motion

for Attorneys Fees and Reimbursement of Costs and Expenses, as of June 6, 1989, (with Judge Muir. of the U.S. District Court, Williamsport, PA.) claiming the Appellant filed a frivolous suit, and, therefore, should pay them $14,701.53 for the defense of this action. Appellees also claim attorneys fees, costs and expenses for additional time that will be incurred in briefing and prosecuting the motion for counsel fees, costs and expenses to a conclusion.

Reasons for Granting the Writ

This is a justiciable case and controversy, concerning federal questions, and therefore, this Honorable Court, as a constitutional court, has jurisdiction, and is empowered to review this matter.

The District Court below, in error, entered in its final order on December 23, 1988, at 3

and 4, that the Appellant, George Miller, failed to prosecute, citing Fed.R.Civ.P. 41(b); link vs. Wabash Railroad Company, 370 U.S. 626, 629-630 (1962).

The said court held in error, in its order of December 23, 1988, that the Appellant should have filed an amended complaint within 20 days, in conformity with orders Nos. 1, 2, 3, 4, 5, 6 and 7 of September 1, 1988, rather than file a motion to modify orders Nos. 1 through 7, entered on September 1, 1988, on September 21, 1988; and that the Appellant should have filed an amended complaint, in conformity with orders Nos. 1 through 7 entered on September 1, 1988, within 20 days, after the court permitted him to do so, by Order No. 2 of October 31, 1988, stating that the Appellant filed a motion on November 14, 1988, to modify said order No. 2, instead.

Said court granted the Municipal Defendants'

motion filed November 23, 1988, for involuntary dismissal, pursuant to Fed.R.Civ.P. 41(b), at 3, of its Order entered on December 23, 1988; and in error, granted Eichenlaub's motion filed December 9, 1988, for involuntary dismissal, pursuant to Fed.R.Civ.P. 41(b), at 3, of its Order entered on December 23, 1988; and, in error, dismissed this case with prejudice, at 3, in its Order entered on December 23, 1988.

The Appellant submits he was denied procedural and substantive "due process" of law by Appellees City of Lock Haven, Municipal Officials, Appellee Municipal agent or employee, Robin A. Yost, Appellees District Justice Frazier and Sheriff Keith Eichenlaub. Appellant was not Mirandized or read his rights, by the Appellee Sheriff, or any of his deputies, when a warrant of arrest, issued by the Appellee District Justice, was served upon

the Appellant, before, or after, he was taken into custody, and delivered by said officers to the Appellee District Justice.

The Appellant was falsely arrested for an alleged criminal offense, which was civil in nature.

The Appellee District Justice had no personal or subject matter jurisdiction to require that the Appellant post a fine and costs for a summary criminal proceeding, subsequent to the filing of a citation by a city employee, though not a "police Officer" or a "law enforcement officer," acted in the capacity as the City Zoning Officer, claiming "police" or "law enforcement" powers. Appellee District Justice Frazier knew, or should have known, that Appellee Yost, had none of these powers, because Frazier had been a police officer in the Lock Haven Police Department, before he was elected as District

Justice of lock Haven. Frazier was a police officer when Yost was hired as Secretary for the City Code Office.

The Appellant contends that Appellee Yost had no authority to file said citation, as a "Zoning Officer" and "law enforcement" officer of Appellee City, against your Appellant, before Appellee District Justice, because she did not act within the scope of her employment. Therefore, Appellee District Justice had no personal jurisdiction over the Plaintiff, in the foregoing alleged violation of the city's sign zoning ordinance.

Rule 52 of the Pennsylvania Rules of Criminal Procedure provides:

> "law enforcement officers shall ordinarily institute summary proceedings by citation.
>
> "Comment: It is intended that a wide variety of officials will have the authority to issue citations and

shall do so as provided in these rules. Such authority is, of course, limited by the extent of the enforcement power given by law to such officials. 'law enforcement officer' includes 'police officer.'"

Pa.R.Crim.P. 3(1) defines "law Enforcement" officer as "any person who is by law given the power to enforce the law when acting within the scope of that person's employment." Pa.R.Crim.P. 3(o) defines "Police Officer" as "any person who is by law given the power to arrest when acting within the scope of the person's employment."

Pa.R.Crim.P. 131. Issuance of Citation of the 1971 Pennsylvania Rules of Court more narrowly defines a "law Enforcement" officer who may file a citation with an issuing authority, and what is meant by the "scope of person's employment."

"(a) When the commission of a summary offense is observed by a police officer, he

may, in his discretion, issue a citation to such person charging the violation of said summary offense.

"(b) For the purpose of this Rule, a police officer shall be limited to a member of the Pennsylvania State Police Force, a member of a police department organized and operating under the authority of any political subdivision and any employee of the Commonwealth or a political subdivision having the powers of a peace officer when acting within the scope of his employment." (emphasis added).

A "peace officer" is a person designated by public authority, whose duty it is to keep the peace and arrest persons guilty or suspected of crime. Restatement, Torts, Sec. 114. 31A Words and Phrases, 1957, at 314 & 315.

The following are peace officers: "The

sheriff and his deputies, constables, marshal, constable, and policemen of any incorporated town or city, and any proper person specially appointed to execute criminal process." 31A Words and Phrases, 1957, supra, at 315.

Appellant would argue that Appellee Yost, acting as Appellee City Zoning Officer, was no "peace officer," having the authority to file a citation for a summary criminal offense against the Appellant.

The Appellant was denied procedural and substantive "due process" of law by Appellee District Justice, and the Appellee City Solicitor, when the Appellant was jailed for refusing to post the fine and costs in advance for a summary criminal hearing; and the Appellant was falsely imprisoned, maliciously prosecuted, wrongfully convicted and wrongfully sentenced, for an alleged criminal offense, which should have been handled as a

civil case.

The Appellant submits, he did not receive a fair trial. He was denied a full and fair opportunity - procedurally, substantially, or evidentially, to present his case, first, before the City Zoning Hearing Board; and he was denied the right to appeal a decision of the said Zoning Board, if unfavorable, to the Court of Common Pleas.

The Appellant would further argue, he did not receive a fair trial; and was denied a full and fair opportunity - procedurally, substantially, or evidentially, to present his case, first, before the City Zoning Hearing Board, before being tried before the Appellee District Justice, in a civil case.

The Appellant did raise constitutional infirmities at the hearing before the Appellee District Justice, contrary to the holding of

the said court below, but he was not required to, because the District Justice Court is a court of limited jurisdiction, and is not a court of "competent jurisdiction" or a court of record; therefore, the minor judiciary was not empowered under our State Constitution, and State laws, to hear and decide federal questions.

The doctrines of res judicata and collateral estoppel do not apply in this case, which is contrary to the holding of the said Court below. And also contrary to the court below, the judgment of the Appellee District Justice was not final, on the merits of the action, before that court, because said action was unlawful, and therefore invalid.

The Appellant was not required to appeal the decision of the Appellee District Justice to the criminal division of the State Trial Court, because the summary proceeding, which

was conducted by the Appellee District Justice, was unlawful.

The Appellant submits he did not attempt to appeal the decision of the Appellee District Justice to the Federal Court; and Appellant's Complaint met the specificity pleading requirements, contrary to the holding of the said lower federal court.

Furthermore, the said court below, in error, refused to allow the Appellant to amend his complaint, to add parties or federal claims or pendente State claims, inter alia, or to file and serve a supplemental pleading, once, as of right, without leave of Court, though the Appellees had not filed and served their Answers.

The said lower court, in error, permitted the Appellees to include in their Motions to Dismiss, pursuant to Fed.R.Civ.P. No. 12(b),

"affirmative defenses" of res judicata and collateral estoppel, which could only be asserted in their answers or responsive pleadings, pursuant to Fed.R.Civ.P. No. 7(a). Therefore, this was in violation of the Federal Rules of Civil Procedure.

The Appellant submits that the judge of the said District Court below grossly abused his discretion, obstructed justice, and denied the Appellant "due process of law" under the Fifth Amendment to the United States Constitution, when requiring the Appellant to amend his complaint to conform to his orders, and by refusing to grant the Appellant a hearing on his request for injunctive relief, against the Appellees interfering with Appellant's right to, again, erect said sign, and other non commercial or "communicative" signs upon private property, without fear of arrest and prosecution.

The Appellant did argue in the lower federal court, that there is no adequate relief in the State courts of Pennsylvania, because the State courts, from past experiences of the Appellant, documented in said courts, Appellant was denied protection of his federal civil rights, in the state trial courts, and the state appellate courts. Even the State's highest appellate Court, the SUPREME COURT, has, consistently, refused to consider, and enforce, its own decisions, or mandates, upon the lower courts, directly on point, relative to its prior holdings.

The court below grossly abused its discretion, obstructed justice, and denied the Appellant "due process of law" under the Fifth Amendment to the United States Constitution in dismissing Appellant's claims with and without prejudice.

And finally, the court below grossly abused

its discretion, obstructed justice, and denied the Appellant "due process of law" under the Fifth Amendment to the United States Constitution in dismissing the action, and inclosing the case.

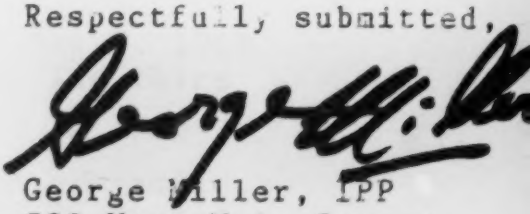
Conclusion

The questions presented to this Honorable Court are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution. Therefore, -

The petition for a writ of certiorari should be granted.

July 27, 1989
Date

Respectfully submitted,



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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-6014

GEORGE MILLER,
Appellant

v.

CITY OF LOCK HAVEN, et al.

Appeal from the United States District Court
for the Middle District of Pennsylvania
(Civil Action No. 86-2026-Scranton)

SUR PETITION FOR REHEARING

Present: GIBBONS, Chief Judge, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD and GARTH, Circuit Judges.

The petition for rehearing filed by appellant, George Miller, in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available

circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ SEITZ
Circuit Judge

DATED: MAY 31, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-6014

GEORGE MILLER,
Appellant

v.

CITY OF LOCK HAVEN, et al.

(Civil Action No. 86-2026-Scranton)
District Judge: Honorable Malcolm Muir

Submitted Under Third Circuit Rule 12(6)
May 1, 1989

BEFORE: SEITZ, COWEN, and GARTH,
Circuit Judges.

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

/s/ SEITZ
Circuit Judge

ATTEST:

/s/ Sally Mrvos
Sally Mrvos, Clerk

DATED: MAY 3, 1989

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

GEORGE MILLER,	:	
Plaintiff	:	Civil No. 88-0347
vs.	:	Complaint Filed 3/4/88
CITY OF LOCK HAVEN, et al.,	:	(Judge Muir)
Defendants	:	

ORDER
December 23, 1988

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

By orders Nos. 1, 2, 3, 4, 5, 6, and 7 of September 1, 1988, we dismissed without prejudice as to all Defendants Miller's cause of action asserted pursuant to the equal protection clause of the Fourteenth Amendment, 42 U.S.C. Sec. 1981, and 42 U.S.C. Sec. 1985, and we dismissed with prejudice as to all Defendants the remainder of Miller's complaint. Also in our orders Nos. 1 through

file an amended complaint within 20 days and we informed Miller that his failure to file an amended complaint within 20 days would result in the dismissal of this action.

Miller did not file an amended complaint within 20 days. Rather, on September 21, 1988, he filed a motion to modify orders Nos. 1 through 7 entered on September 1, 1988. On September 22, 1988, Miller filed an amended motion to modify orders Nos. 1 through 7 entered on September 1, 1988. By order No. 2 of October 31, 1988, and order of November 1, 1988, (1) we permitted Miller within 20 days of October 31, 1988, to file an amended complaint in conformity with our orders Nos. 1 through 7 of September 1, 1988, (2) except for the enlargement of time within which Miller was permitted to file and amended complaint, we denied Miller's amended motion filed September 22, 1988, to modify orders Nos. 1 through 7 entered on September 1, 1988, (3) we denied

Miller's motion filed September 21, 1988, to modify orders Nos. 1 through 7 entered on September 1, 1988, and (4) we informed Miller that his failure to file an amended complaint within 20 days of October 31, 1988, would result in the dismissal of this action.

Miller did not file an amended complaint within 20 days of October 31, 1988. Rather, on November 14, 1988, he filed a motion to modify order No. 2 entered on October 31, 1988, and an amended motion to modify order No. 2 entered on October 31, 1988. By order of December 1, 1988, we denied Miller's motion filed November 14, 1988, to modify order No. 2 entered on October 31, 1988, and we denied Miller's amended motion filed November 14, 1988, to modify order No. 2 entered on October 31, 1988.

On November 23, 1988, Defendants City of Lock Haven, Stuempfle, Taggart, Yost, Saxton, Decker, Hendricks, Houser, Shade, and Smith (hereinafter "Municipal Defendants")

filed a motion for involuntary dismissal pursuant to Fed.R.Civ.P. 41(B). Defendants Frazier and Eichenlaub both concurred in the Municipal Defendants' motion for involuntary dismissal. The Municipal Defendants filed a brief in support of their motion for involuntary dismissal on December 2, 1988. Miller filed a brief in opposition to this motion on December 14, 1988. The Municipal Defendants indicated to the Clerk of Court by telephone on December 15, 1988, that they would not file a reply brief and this telephone call was confirmed by letter filed December 16, 1988.

On December 9, 1988, Defendant Eichenlaub filed a motion for involuntary dismissal pursuant to Fed.R.Civ.P. 41(b) and a brief in support thereof. The Municipal Defendants and Defendant Frazier concurred in Eichenlaub's motion for involuntary dismissal. Miller filed a brief in opposition to Eichenlaub's motion for involuntary

dismissal on December 14, 1988. By telephone call to the Clerk of Court on December 19, 1988, Eichenlaub indicated that he would not file a reply brief, and this telephone conversation was confirmed by letter filed December 21, 1988.

Miller has had ample opportunity to file an amended complaint, yet as of today's date, he has not done so. Miller has not filed a motion for enlargement of time within which to file an amended complaint. The time within which Miller was permitted to file an amended complaint expired on November 21, 1988. Miller has been informed on two occasions that his failure to file an amended complaint within the time permitted by this Court would result in the dismissal of this action. Miller has clearly failed to prosecute this action and, therefore, it is proper for us to dismiss it. See Fed.R.Civ.P. 41(b); Link vs. Wabash Railroad Company, 370 U.S. 626, 629-630 (1962).

NOW, THEREFORE, IT IS ORDERED THAT:

1. The Municipal Defendants' motion filed November 23, 1988, for involuntary dismissal pursuant to Fed.R.Civ.P. 41(b) is granted.

2. Eichenlaub's motion filed December 9, 1988, for involuntary dismissal pursuant to Fed.R.Civ.P. 41(b) is granted.

3. This action is dismissed with prejudice.

4. The Clerk of Court shall close the file in this case.

/s/ MUIR
Muir, U.S. District Judge

MM:be